IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.466 OF 1995

Krishna Balkrishna Thakur — Appellant (Org.Accd.No.1)

Vs.

The State of Maharashtra — Respondent

Mr. Prakash Naik for Appellant.
Mr. D.R. More, APP for Respondent-State.

CORAM: S.S. PARKAR & ANOOP V. MOHTA, JJ.

Date : April 20, 2005.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This appeal is filed against the judgment and order dated 31/8/1995 delivered by the Additional Sessions Judge, Thane convicting the appellant - original accused no.1 for the offence of murder under Section 302 of IPC and sentencing him to RI for life in Sessions Case No.383 of 1991.

2. The appellant - original accused no.1 was prosecuted along with three other accused persons for the offences under Sections 302, 336, 427, 201 and 506 read with Section 34 of IPC in the Sessions Court, Thane in the following circumstances.

. Both the deceased as well as the accused were

residents of village Usarni, Taluka Palghar, District Thane. The deceased was residing along with his mother and two sisters Mangala and Sheela. The two sisters Mangala P.W.2 and Sheela P.W.3 were working women. While Mangala P.W.2 was working in Diamond Company, Sheela P.W.3 was serving in Slippers Company. They used to leave for their work by 6.15 a.m. by S.T. Bus and return at 8 p.m. Since they used to return in the night and had to walk the distance for about 15 to 20 minutes from the S.T. Bus Stop to their house, their brother deceased Pradeep used to go to the Bus Stop every evening to escort them back to their residence from the Bus Stop. On 5/4/1990, as usual, deceased Pradeep was going to Bus Stop to receive his sisters. That day he was accompanied by P.W.8 Manoj Patil. On the way, when they reached upto the house of one Narayan Pawar, appellant along with his three companions, who were arraigned as accused nos.2 to 4 assaulted the deceased. The appellant assaulted the deceased with a sickle on his head while the others only gave fist and kick blows, as a result of which deceased fell down. The two ladies thereafter arrived by Bus at the Bus Stop. When they got down, they did not find their brother waiting for them and, therefore, they proceeded towards their house. On the way they saw their brother lying down

in front of the house of one Narayan Pawar. When Mangala inquired with her injured brother Pradeep, he told her that he was assaulted by the appellant. Both the sisters then went to their house and informed their mother that deceased was lying in injured condition. The mother sent a word to the deceased's uncle Namdev, who in turn asked P.W.1 complainant Ganesh Thakur to go to the place of incident. The complainant, therefore, along with other ladies went to the place of incident where deceased was lying in injured condition. The injured was removed to the Primary Health Centre of Saphala in a bullockcart where they reached at about 1.30 in the night. After giving initial treatment, the doctor at Primary Health Centre advised them to take the patient to Bhagwati Hospital at Borivali. The patient was removed to the Bhagwati Hospital at Borivali at about 5 a.m. Thereafter for want of facility for operation in that hospital the patient was removed to Nair Hospital on 6/4/1990. The patient ultimately died in the evening of 7/4/1990. As the patient had been taken to the hospital for immediate medical aid, no complaint was lodged. The incident had taken place in the night and from there the patient was taken to Saphala Primary Health Centre at 1.30 in the night, from there he was removed to Bhagwati Hospital at Borivali at about 5

a.m. and thereafter to Nair Hospital. From Nair Hospital intimation was given to the Agripada Police Station where the statement of P.W.1 was recorded on 6/4/1990. That complaint was then transferred to Palghar Police Station as the offence was committed in the jurisdiction of that police station.

3. Thereafter the crime was registered against the accused and investigation was started. Fresh statement was recorded by the Palghar Police of the complainant P.W.1. The statements of other witnesses including P.W.8, claiming to be an eye witness and the two sisters Mangala and Sheela were also recorded. After the arrest of the appellant, the search of his house was taken from where a sickle was attached under seizure panchanama. The charge-sheet was filed against the appellant. Subsequently, other accused were arrested and the supplementary charge-sheet was filed against them. The cases were committed to the Sessions Court.

4. Before the Sessions Court two separate cases were filed bearing Sessions Case No.383 of 1991 against the appellant and Sessions Case No.72 of 1992 against the co-accused. Before the Sessions Court charges came to be framed against all the four accused

for offences under Sections 302, 336, 427, 201 and 506 read with Section 34 of IPC, to which all the accused pleaded not guilty. On behalf of the prosecution 12 witnesses were examined, which included the complainant Ganesh Thakur P.W.1 and two sisters Mangala and Sheela i.e. P.Ws.2 and 3 respectively and eye witness Manoj Patil P.W.8. Apart from them two doctors were examined, one Dr.Milind Randive from Primary Health Centre, Saphala as P.W.7 and Dr. Prakash Shilotri, attached to Nair Hospital as P.W.4, who had conducted post mortem examination on the dead body. The other witnesses are panch witnesses and the police witnesses. Ramdas Vaity P.W.11 who was panch for the recovery of sickle from the house of the appelllant had turned hostile. Among the police officers are P.W.6 Anant Bhoir, Head Constable of Palghar Police Station, P.W. 9 PSI Ranjit Abhankar who investigated the case and P.W. 10 API Dattatray Borade. Lastly P.W.12 is ACP Pandurang Niphade who also conducted part of the investigation. The defence of the appellant was of denial.

5. After considering the evidence on record, the Additional Sessions Judge, Thane by his impugned judgment and order acquitted accused nos.2 to 4 but convicted the appellant for offence under Section 302

of IPC and sentenced him to RI for life. The said order of conviction and sentence is under challenge in this appeal filed by the convicted accused.

6. With the help of the advocates from both the sides we went through the evidence on record and find that the prosecution has not proved the offence of murder against the appellant beyond reasonable doubt.

7. The prosecution has mainly relied on the evidence of P.W. 8 Manoj Patil who has been examined as an eye witness to the incident. The prosecution has also relied on the evidence of two sisters Mangala and Sheela i.e. P.Ws.2 and 3 respectively for the alleged oral dying declaration made to them by the deceased immediately after the incident in question.

8. So far as the evidence of P.W. 8 is concerned, he has deposed that on the date of the incident deceased went to his house at about 8 p.m. and requested him to accompany him to go to the Bus Stop of the village to bring his two sisters. When they were going to the Bus Stop and reached near the house of one Narayan Pawar, the appellant came there with sickle in his hand and assaulted the deceased on his head. The other accused gave kick and fist blows

to the deceased. Deceased fell down because of the assault on him. Thereafter appellant rushed towards the witness and tried to assault him with the sickle, but he could avoid the assault with the help of a stick. In the meanwhile Bus arrived and two sisters of the deceased came. Thereafter relatives of the injured came there and injured was taken in the bullockcart.

9. Then there is evidence of Mangala P.W.2 and Sheel P.W.3, the two sisters of the deceased. They deposed that when they arrived by Bus at the Stop their brother, who used to come to take them back home, was not there and, therefore, they started walking towards their house. After walking for some time they found their brother lying in injured condition opposite the house of Narayan Pawar. When Mangala asked the injured as to who assaulted him, he told them that the appellant had assaulted him. Both of them deposed that appellant was standing there holding sickle in his hand. Sheela has also further deposed that the appellant told them that he had assaulted their brother. Thereafter they went to their house and informed their mother about the incident, who in turn sent a word to the deceased's uncle Namdev. P.W.1 Ganesh Thakur, who has lodged the

complaint, has deposed that his uncle Namdev went to his house and informed him about the incident and asked him to go to the place of incident. Thereafter he and others went to the place of incident and removed the injured firstly to the Primary Health Centre at Saphala and from there to Bhagwati Hospital at Borivali and lastly to Nair Hospital. The complaint was lodged at Agripada Police Station on the following day i.e. 6/4/1990 which is produced on record at Exh.21.

10. No doubt P.W.8 claims to be an eye witness to the incident and though he refers to the arrival of two sisters Mangala and Sheela from the Bus after the incident in question, significantly the two sisters do not refer to the presence of P.W.8 Manoj Patil being at the place of incident. According to the two sisters, on inquiry by them they were told by the injured that he was assaulted by the appellant. When P.W. 8 Manoj Patil had accompanied the deceased and in his presence the deceased was assaulted by the accused and when he claims further that he was there at the place of incident when P.Ws.2 and 3 i.e. the sisters of the deceased arrived there, his presence ought to have been referred to by the two sisters. As soon as the two sisters arrived at the place of

incident on their way back home, P.W. 8 was expected to tell them about the incident that it was the appellant who had assaulted the deceased. But neither P.W.8 nor the two sisters say so. There is, therefore, doubt whether P.W. 8 was an eye witness to the incident. It is stated that the deceased daily used to go to the Bus Stop to receive his two sisters when they used to return from their work by S.T. Bus. Thus the presence of P.W.8 on that day was not natural. He was a chance witness and, therefore, his presence at the place of incident ought to have been spoken by the two sisters who were the natural witnesses as the incident had taken place on their way back from their place of work when the deceased had gone to receive them. However, the incident had not taken place in their presence.

11. So far as the two sisters are concerned, the prosecution is relying on the oral dying declaration made to them by the deceased. It is important to mention that in the first information report i.e. the statement made by the complainant P.W.1 Ganesh Thakur on 6/4/1990 at Agripada Police Station, which is produced at Exh.21, he mentions that his uncle Namdev Thakur told him that deceased Pardeep was assaulted by Krishna Thakur and his associates as a result of which

he was lying injured in unconscious state. Pursuant to that information given to him he had gone to the place of incident. When he went to the place of incident, he personally found the injured in unconscious condition. Now his source of information is uncle Namdev who was sent a word by the mother of the deceased pursuant to the information given to her by the two sisters of the deceased. But the information which he received from his uncle Namdev was that deceased was lying injured in unconscious state. Therefore, that information must have come from the original source i.e. the two sisters. If the two sisters had given the information that their brother was lying unconscious in injured condition, their version that on inquiry by them their injured brother told them that appellant had assaulted him will have to be accepted with a pinch of salt, particularly when their statements were recorded on 9/4/1990 that is after a period of four days. One cannot find fault with the recording of the statements of various witnesses on 9/4/1990 which was justifiable due to the circumstances of the case. The incident had taken place in the night and the patient was to be taken for medical aid from one hospital to another hospital and then lastly to Nair Hospital at 6 a.m. on the following morning and thereafter the report of

P.W.1 who was cousin of the deceased was recorded by the Agripada Police Station in which the name of the accused having been disclosed, there was no necessity for the police to record the statements of the other witnesses immediately when they were supposed to be at Palghar and the patient was in Nair Hospital, Mumbai. Palghar is not close to Mumbai and though it is in Thane District, the only quickest mode of transport is by railway which would also take about 3 hours of journey and the patient was still unconscious but had not breathed his last. There was every hope that he would regain consciousness and then his own statement could be recorded. He was declared dead in the evening of 7/4/1990 and thereafter the complaint was transferred from Agripada Police Station to Palghar Police Station and considering these circumstances, it cannot be said that there was unusual delay in recording the statements of sisters on 9/4/1990. But the earliest complaint lodged on the following day itself mentions that before the complainant goes to the place of incident and sees for himself that the patient was unconscious which must be within half an hour after the incident and he was informed before he went to the place of incident that the patient was unconscious, which could have been told only by the two sisters to their mother, who had sent a word to

deceased's uncle Namdev, who in turn informs complainant P.W.1 Ganesh Thakur. Thus the version of oral dying declaration allegedly made to the two sisters by the deceased cannot be true as they had informed their mother that their brother was lying unconscious in injured condition.

12. In view of this statement of P.W.1 complainant dated 6/4/1990 lodged with the Agripada Police Station, it is doubtful whether the deceased was in a state of consciousness to make an oral dying declaration to the sisters. There is no other corroborating circumstance in the case. The recovery of sickle from the house of the appellant which is stated to be produced by the appellant himself is not at all incriminating circumstance in as much as that sickle was not blood stained and the recovery panchanama Exh.47 dated 9/4/1990 itself mentions that it was washed. So only evidence led by the prosecution is the evidence of alleged eye witness P.W. 8 Manoj Patil and the two sisters Mangala and Sheela to whom the deceased had allegedly made oral dying declaration.

13. As discussed above, it is doubtful whether

P.W. 8 was an eye witness to the incident so also there is doubt whether the deceased was in a position to make oral dying declaration to the two sisters who, as per the report Exh.21 made by Ganesh Thakur P.W.1, was stated to be unconscious. No doubt the name of the appellant was mentioned at the earliest juncture in the report of P.W.1 but both the sources involving his name in the offence, one by the eye witness and the other due to the alleged oral dying declaration made to the two sisters being doubtful, we have to give benefit of doubt to the appellant. He is, therefore, entitled for benefit of doubt and consequently the order of conviction of the appellant is liable to be quashed and set aside.

14. In the result, the appeal is allowed. The order of conviction and sentence recorded against the appellant on 31/8/1995 by the Additional Sessions Judge, Thane in Sessions Case No. 383/1991 is set aside and the appellant is acquitted.

. The bail bond of the appellant shall stand cancelled.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)